

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LETICIA LUCERO.

NO. 2:13-cv-00602 RSL

Plaintiff.

vs.

**CENLAR FSB and BAYVIEW LOAN  
SERVICING, LLC, et al.,**

MOTION TO ACCEPT THIRD  
AMENDED COMPLAINT AS FILED  
OR IN THE ALTERNATIVE, MOTION  
FOR LEAVE TO AMEND SECOND  
AMENDED COMPLAINT IN ITS  
ENTIRETY

## **NOTE ON MOTION CALENDAR:**

FRIDAY, NOVEMBER 14, 2014

Plaintiff LETICIA LUCERO, by and through the undersigned counsel, respectfully moves the Court for an Order Accepting the Attached Third Amended Complaint, or in the alternative, for leave to amend her Second Amended Complaint in its entirety pursuant to *FRCP 15(a)*.

## I. PROCEDURAL FACTS

1. Plaintiff moved to amend her Complaint on May 13, 2014 (Dkt. #60), The Court granted Plaintiff leave to amend via order (Dkt. 77). Plaintiff filed her Second Amended

**MOTION FOR LEAVE TO AMEND - 1**

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1 Complaint on the same day (Dkt. # 78).

2       2. Defendants Cenlar, MERS, Dobron and Morris filed Motion to Dismiss on July  
3 10, 2014 (Cenlar's Motion to Dismiss) (Dkt. #82).

4       3. On October 3, 2014, this Court issued Amended Order Granting in part and  
5 Denying in part Cenlar's Motion to Dismiss. The Court's Order authorized Plaintiff to amend  
6 her claims under RESPA and TILA (Dkt. #107 ).

7       4. Defendant Bayview filed its Motion to Dismiss on July 31, 2014 (Dkt. #90).

8       5. On October 3, 2014, this Court issued Order Granting in part, and Denying in  
9 part Bayview's Motion to Dismiss. The Court's Order authorized Plaintiff to amend her  
10 FDCPA claims (Dkt. #119).

11       6. Plaintiff seeks to amend the Second Amended Complaint, in addition to those  
12 claims permitted by the Court, to add or modify claims to reflect changes in the law based on  
13 Washington Supreme Court's issuance of *Frias v. Asset Foreclosure Services, Inc.*, 2014  
14 Wash. LEXIS 763 (2014).

15                   **II.     LEGAL AUTHORITIES & ARGUMENT**

16       This Court has held previously in *McDonald v. OneWest Bank*, FSB, 2012 U.S. Dist.  
17 LEXIS 21449 (W.D. Wash. 2012) that "Courts 'should freely give leave [to amend] when  
18 justice so requires.' Fed. R. Civ. P. 15(a)(2). There is a 'strong policy in favor of allowing  
19 amendment' after 'considering four factors: bad faith, undue delay, prejudice to the opposing  
20 party, and the futility of amendment.' *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). The  
21 underlying purpose of Rule 15 is 'to facilitate decision on the merits, rather than on the  
22 pleadings or technicalities.' *Lopez v. Smith*, 203 F.3d 1122, 1127." *McDonald, supra*. HN3Go  
23 to the description of this Headnote. Rule 15(a) expresses a strong presumption in favor of  
24 liberal pleading:

1 Rule 15(a) declares that leave to amend "shall be freely given when justice so  
2 requires"; this mandate is to be heeded. If the underlying facts or circumstances  
3 relied upon by a plaintiff may be a proper subject of relief, he ought to be  
4 afforded an opportunity to test his claim on the merits. In the absence of any  
5 apparent or declared reason--such as undue delay, bad faith or dilatory motive  
6 on the part of the movant, repeated failure to cure deficiencies by amendments  
7 previously allowed, undue prejudice to the opposing party by virtue of  
8 allowance of the amendment, futility of amendment, etc.--the leave sought  
9 should, as the rules require, be "freely given."

10 *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

11 On September 18, 2014, the Washington Supreme Court issued *Frias v. Asset*  
12 *Foreclosure Services, Inc.*, 2014 Wash. LEXIS 763 (2014), holding that the DTA does not  
13 create an independent cause of action for monetary damages based alleged violations of its  
14 provisions if no foreclosure sale has been completed. The decision impacts all of Plaintiff's  
15 DTA claims against the Defendants. Based on *Frias*, the proposed amendment, then, simply  
16 offers a new legal theory, and amendments that merely propose alternative legal theories for  
17 recovery on the same underlying facts should generally be permitted. See *Mayeaux v.*  
18 *Louisiana Health Service & Indemnity Co.*, 376 F.3d 420, 427 (5th Cir. 2004); *Lowrey v. Texas*  
19 *A & M University System*, 117 F.3d 242, 246 n.2 (5th Cir. 1997); *In re Integrated Resources,*  
20 *Inc.*, 157 B.R. 66, 71 (S.D.N.Y. 1993).

21 This Court has already granted Plaintiff leave to amend. The only additional relief  
22 requested is Plaintiff's ability to plead an alternative theory of liability in place of liability  
23 arising out of the DTA. Justice will be served by the Court's grant of leave to amend.  
24

### 25 III. CONCLUSION

26 For all of the foregoing factual reasons and legal citations, Plaintiff prays the Court to  
27 accept her Third Amended Complaint as attached or, in the alternative, allow her to amend her  
28 claims as set forth in the attached Third Amended Complaint to this Motion.  
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30  
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1 DATED this 21<sup>st</sup> day of October, 2014.  
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4

5 /s/ Vicente Omar Barraza  
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